

THE IMPLEMENTATION OF THE EU LEGISLATION IN THE MEMBER STATES – THE URBAN WASTE WATER DIRECTIVE IN SPAIN AND ENGLAND AND WALES

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1. Introduction

The European Union started to pay closer attention to the implementation and enforcement of Community environmental law in the 1990s, as concerns were raised about the existence of important implementation gaps in the member states. Various measures were put in place to favour compliance with EU directives, such as the publication of an Annual Survey on the implementation and enforcement of Community environmental law¹, the passing of directive on environmental liability², the resolutions on minimum criteria for environmental inspection³, the promotion and training for magistrates and lecturers of environmental law, etc.

Despite these measures to tighten the controls exerted by EU institutions, a common understanding has been that Community environmental legislation can only be effective if it is fully implemented and enforced by Member states. Data on the application of EU legislation shows, in this regard, strong variation on the levels of compliance with EU legislation – see table below on percentages of infringements opened against the member states, from 1978 to 1999 (EU-12)⁴.

¹ Commission staff working paper of 27 April 1999: First annual survey on the implementation and enforcement of Community environmental law

² [Directive 2004/35/EC](#) of the European Parliament and of the Council of 21 April 2004 on "environmental liability with regard to the prevention and remedying of environmental damage". The directive was issued in 2004, but the first green paper dates of 1993.

³ European Parliament resolutions of 14 May 1997 and Council of Ministers' resolution of 7 October 1997 on the need to fix criteria and/or minimum guidelines for inspections performed in Member States

⁴ From Borzel, 2001, p. 818.

Table 4 Leaders and laggards of compliance with Community law

	<i>Art. 226 Formal Letters %</i>	<i>Art. 226 Reasoned Opinions %</i>	<i>Art. 226 ECJ Referrals %</i>	<i>Art. 226 ECJ Judgments %</i>	<i>Delayed Compliance with ECJ Judgments %</i>
Italy	11.6	16.0	22.2	30.4	24.6
Greece	11.3	12.7	13.7	12.8	11.7
Portugal	10.8	11.1	12.7	0*	1.7
France	10.3	11.1	12.3	7.5	8.7
Belgium	8.4	10.0	7.5	15.9	18.3
Spain	10.1	8.1	6.8	6.6	8.7
Germany	7.8	7.8	6.1	10.6	10.0
Ireland	6.6	6.4	6.1	3.9	4.6
Luxembourg	6.2	6.3	5.0	3.5	3.8
UK	6.6	4.5	3.5	2.7	2.9
Netherlands	5.9	4.4	2.8	3.9	3.3
Denmark	4.5	1.6	1.3	2.2	1.7
EU average	8.3	8.3	8.3	8.3	8.3

Sources: columns 2–4: aggregate data of the Annual Reports; column 5: EUI database on member state compliance with Community law (www.iue.it/Rsc/Rsc_tools); column 6: data from the Annual Reports.¹⁶

* There are no ECJ Judgments for Portugal listed in the Annual Reports, whereas we find six cases of delayed non-compliance with ECJ Judgments; aggregate data on ECJ Judgments are only available from 1978 to 1992.

These variances have been focus of attention in the literature, which has enquired why certain countries consistently comply with EU environmental legislation whereas others do not. This question has been linked to a wider debate on the impact of the EU on member states and the conditions for the abandonment of national practices and the adoption of EU legislation. The Europeanization literature has provided a widespread answer related to the idea of “goodness of fit”. In essence, “goodness of fit” is the “match” existing between the EU and the domestic policy and institutions: if European regulatory requirements do no match with domestic policy making (therefore displaying misfit) it is likely that EU member states will have a hard time coping with these EU requirements. Policy or institutional misfit is therefore the principal cause of lack of compliance (for instance, Knill and Lehmkuhl 1999; Börzel and Risse 2000; Duina, 1999, Falkner 2003, Börzel/Risse 2003)

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This thesis argues that if we try to understand the impact of the EU on the member states, “goodness of fit” explanations face strong limitations. Three reasons stand out: (1) The dichotomy good /bad implementers says little about the manner in which different member states face the demands of the EU. (2) Europeanization studies employ data published by the EU, which focuses on formal transposition of directives and meeting of formal deadlines. The validity of this data to assess compliance with EU legislation is, however, limited, as it only accounts for a fraction of the total number of infringements occurred (namely, infringements for lack of transposition and cases flagged to the Commission or the ECJ and not national infringements); (3) These accounts do not apprehend satisfactorily the role of subnational and non-state actors, on which implementation frequently depends, as they tend to focus on the actions and nature of national governments.

In essence, I claim that to understand the impact of the EU on the member states the analysis should not focus on why certain countries apply the legislation, but on what accounts for the different ways of reacting to the legislation’s demands. To do so, the research has been designed inductively, so to identify and trace the mechanisms employed by member states to confront EU demands. My focus has been to provide a good case selection that allows tracing the implementation process from the moment when the directive arrives to member state to the later stages of monitoring and enforcing non-compliance at the national level.

2. Case selection

2.1. The directive

The Urban Waste Water Directive (UWWTD) was adopted in 1991 to protect the water environment from the effects of urban and industrial waste water discharges. Its outlook is essentially protective: it aims to provide the necessary measures to avoid both the environmental damages and the public health harm that urban waste water produces. The UWWTD establishes that all significant sewage discharges need to be treated before they are disposed to rivers or coastal areas. To do this, the UWWTD defines a set of criteria to prioritise waste water treatment, which depend upon the population served by the sewerage treatment plant and the type of receiving water

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into which it discharges. The directive also sets a timetable for meeting certain standards of waste water discharge from sewerage treatment plants in order to press on the implementation and to monitor the progress made by member states.

This directive is appropriate for the purposes of this research. It is a demanding directive, both in terms of the procedures it establishes and the substantive requirements it makes. It is thus a suitable case to test whether Europeanization mechanisms differ in different member states: the UWWTD is a hard case to show that there are significant variances on Europeanization mechanisms in member states during implementation, even when detailed information and instructions on what to do are provided.

2.2 Spain and England and Wales.

Spain and England and Wales are two “most different cases” in their water regulatory regime. In the case of Spain, water is a public resource. All water treatment measures are direct responsibility of the state. As a decentralised country, the Spanish national and regional governments share responsibilities for implementing and monitoring controls for polluting activities. In the English and Welsh case, a new framework for economic and environmental regulation was created after privatisation of the water sector. The government maintains an arm’s length relation with the water industry. Independent agencies are in charge of economic (Ofwat) and environmental (Environment Agency) regulation with emphasis being placed on opening up the service to market competition –preventing monopoly abuse from water companies- and ensuring environmental protection.

Both countries, however, do share certain characteristics. At transposition, neither of them had a sufficiently developed policy for control of water pollution. Besides, the distribution of competences between national policy actors in both cases was in a state of influx; the demands of the EU directive created pressure to define the competences of the different actors. Policy and institutional misfit is therefore present in both cases. As theories on goodness of fit predict, the number of infringements registered by the Commission for this directive is similar in the two cases. For these reasons, Spain and England and Wales are suitable cases for exploring the existence of different national strategies for compliance with EU demands.

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3. Design and methodology

The structure of the thesis is threefold, corresponding with three different implementation stages: national policy design, policy delivery and national monitoring and enforcement. Each part is made up of two chapters, one for each country case. The differentiation in stages allows to conceptualise implementation as a process that develops during a period of years, surpassing the understanding of implementation as a narrow transposition of EU obligations into national legislation. The thesis therefore assumes that, once a directive is adopted, its implementation consists, first, on the design of a strategy to comply; secondly, on the execution of the policy agreed and thirdly, on the national measures to incentive compliance and to penalise non-compliance.

The data sources are official and annual reports and newspapers articles, from the year of transposition (1994 in the English and Welsh case and 1995 in the Spanish case) to December 2005, which is the final deadline when, according to the UWWTD, all EU countries should have applied the legislation fully.

4. Findings

Part 1 - Design of strategy

This part of the thesis aims to understand the development of the strategy to apply the UWWTD in Spain and in England and Wales. To do so, it focuses on the role of the national government and other national policy actors in designing and negotiating three types of policy instruments: command and control measures, national infrastructure plans, and market-based instruments (taxation). This part compares both the process of agreement on the policy instruments and the result of the negotiation in the two country cases.

In England and Wales, the agreement on the policy strategy was preceded by a long negotiation between national policy actors. The national government, the private companies, the environmental and the economic regulators discussed the terms and instruments for the application of the directive in quadripartite meetings. The national

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strategy to comply with the UWWTD was the result of a compromise between the conflicting interests of these national actors.

In the case of Spain, the strategy was largely defined by the national government, with very limited contributions from regional governments – whose environmental competences were not fully devolved. In doing so, the national government not only defined the content and the manner in which the UWWTD had to be implemented, but distributed the competences that regional powers would have. The national government maintained a pivotal position in shaping the content of the policy and distributing powers between the national actors.

The resultant strategy for implementation of the UWWTD in the two countries has had different characteristics:

- The command and control measures in England and Wales contained a laxer interpretation of key directive concepts than in Spain, where the national government pressed for a stricter definition of protected coastal and river areas.
- The national infrastructure plan in England and Wales accommodated the requirements of the water industry and the economic regulator – which pressed for lower investments. In Spain, the design of the national infrastructure plan was carried out by the national government, which defined the level of investment required with reduced participation from other actors.
- Water prices and taxation in England and Wales transferred the full costs of applying the legislation to water customers, complying with the polluter pays principle. Although Spain developed a taxation system for water pollution, this did not reflect water costs. Works were financed by national and regional budgets and by EU funds.

This part verifies that the impact of the EU on sectoral policies depends on the existing national regulatory framework. In state-led frameworks it is the government that articulates and controls the impact of the EU, whereas in regulated privatised systems the government keeps a lesser role, whereas private companies and independent regulators maintain bargaining power during the definition of the strategy.

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Part 2. Delivery

Part 2 focuses on the delivery of the national policy strategy agreed at the design stage. It analyses whether the national policy instruments to apply the UWWTD have been executed as agreed during the design stage. The underlying assumption is that there are differences between the design and the delivery of the policy instruments, which a fuller account of the impact of the EU on the member states needs to analyse.

In the case of England and Wales, the strategy to comply with the UWWTD has been modified in successive quadripartite meetings, in 1999 and 2004. In those meetings, the national government has exerted a bigger influence and managed to bring about measures that fitted its preferences against those of the economic and the environmental regulators and the water companies. The new modified command and control measures interpreted the directive requirements more severely and forced a larger investment in the national infrastructure plans. Water prices were controlled so water companies had to deliver higher environmental and service standards while limiting transferring costs to customers. During delivery, therefore, the balance of power between national actors has changed and, with it, the impact of the policy instruments employed to apply the UWWTD. New directions in implementation have been agreed in a formal setting.

In Spain, modifications of the strategy to comply also took place, but in a different manner. The regional actors, which were given responsibilities to carry out national policy instruments, have either ignored or reinterpreted the command and control measures given by the national government on the implementation of the directive. Also, the distribution of responsibilities for the application of the national infrastructures plans have not taken place as designed; the national government has taken a more relevant role as the regional governments did not fulfil some obligations. Water taxation, which the national government commanded to the regional powers, has been applied in fewer cases than expected, and with lesser impact than predicted at design. The evidence shows that in the Spanish case, unlike in England and Wales, the modifications in the national strategy to apply the UWWTD have not been coordinated between the national policy actors, but have taken place more informally and ad hoc. Hence, although during the strategy design the national government

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seemed to have controlled the implementation process, during delivery its powers have been reduced as implementation became dependent on the actions and powers of the regional authorities.

The results of this part of the thesis build on the conclusions from Part 1: national regulatory framework shapes the manner in which the directive is applied. However, by focusing on the delivery of the strategy, Part 2 shows that the impact of the EU on the member states relates equally to the capabilities of the national policy actors to shape the policy in the making, both formally and informally. In the English and Welsh case, the national government managed to gain a more central position during delivery, with the limitations imposed by the institutional setting, by making their preferences prevail during the delivery phase. In the Spanish case, the national government, however, lost some of its relative power during the delivery phase to the regional authorities which, although had not participated in the design of the policy, became pivotal actors in defining fundamental characteristics of its delivery.

Part 3. Monitoring and enforcement

This part of the thesis compares the measures taken by different competent authorities to ensure the observance of the legislation. It examines both monitoring and enforcement measures taken to ensure that policy network actors do as agreed. This provides a fuller account of the implementation process: an effective enforcement programme can help to create an atmosphere in which the regulated community (individuals and/or entities whose actions the State seeks to address) complies with the regulatory framework. It provides with a more nuanced view of how the EU impacts the EU member states. These chapters are in progress, so no findings to share as yet.

5. Extrapolating findings and hypothesis creation

As it stands, the thesis currently holds three different propositions in each of its constituent parts: Part 1 is about the influence of the institutional framework in the implementation design; Part 2 is about the influence of national actors during the delivery phase; Part 3 is about implementing compliance. One of the main challenges of the thesis is to interconnect the three parts of the implementation process to bring

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about a consistent explanation on the impact of the EU in different member states. Overall, the research points at a discussion on the role of national regulatory framework and the power of the national government in shaping the national implementation strategy, but help to sharpen the theoretical contribution of the thesis would be particularly appreciated!

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